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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/581,239
Filing Date: June 02, 2006
Appellant(s): ARSLANKIRAY ET AL.

Andre Pallapies
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 06/04/2009 appealing from the Office action
mailed 02/01/2010.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 13-36

(4) Status of Amendments After Final

The amendments after final rejection contained in the brief has not been entered, The claims under appeal are the claims entered 11/18/2009.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

No evidence is relied upon by the examiner in the rejection of the claims under appeal.

5669498	Fierek	9-1997
5,344,023	Cox	9-1994
3,392,874	Peebles	7-1968

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.
2. Claims 32 stand 35 stand rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Applicant claims each of the wall sections is located diametrically opposite to a recess, but viewing fig. 1 corners, or in other words,

the walls located at the end panels face each other. They are not located diametrically opposite of each other as claimed.

3. Claims 32 and 35 stand rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Since applicant's own disclosure does not support the newly amended claims 32 and 35, it is considered new matter. The walls are not shown as meeting the diametrically opposite recitation.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 13-30,31,32,34 and 35 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Fierek (USPN 5,669,498) in view of Cox (USPN 5,344,023).

Fierek discloses the invention substantially as claimed.

5. With respect to claim 13, Fierek shows a support plate (68,70,72,74) in which a plurality of receptacles (18,20,22,24) for respectively one egg is formed, and a wall (102) surrounding the support plate, and that the surrounding wall (102) is divided into a plurality of wall sections separated by recesses (80,82,84,86).

6. With respect to claim 14, Fierek shows the wall (102) sections are each constructed such that they project over the circumference of the support plate (fig. 4).

7. With respect to claim 15, Fierek shows a section of the circumference of the support plate (68,70,72,74) on which an upright wall section (102) is arranged so that it projects over the circumference is located diametrically opposite to a section of the circumference on which a recess (80,82,84,86) is located.

8. With respect to claim 16, Fierek shows, wherein at least two wall sections (112) are arranged on a longitudinal edge of the support plate.

9. With respect to claim 17, Fierek shows further comprising a spacer (the recess at the distal end of 68,70,72,74 shown but not labeled) disposed on an underside of the support plate.

10. With respect to claim 18, Fierek shows further comprising a second egg tray (16) including a second support plate (68,70,72,74) in which a plurality of receptacles (18,20,22,24) for respectively one egg is formed, and a second wall (102) surrounding the second support plate, wherein the second surrounding wall is divided into a plurality of second wall sections separated by recesses (80,82,84,86).

11. With respect to claim 19, Fierek shows the wall sections of the egg tray differ in height from the second wall sections of the second egg tray (fig. 1).

12. With respect to claim 20, Fierek shows the wall sections of the egg tray and the second wall sections of the second egg tray (16) have substantially the same dimensions with regard to height (to the extent “substantially the same” is defined, fig. 1 also meets this claim language).

13. With respect to claim 21, Fierek shows the two egg trays can be stacked by engagement of the wall sections of one of the egg trays into the recesses (80,82,84,86) of the other egg tray (fig. 9).

14. With respect to claim 22, Fierek shows a handle (26) projecting from the support plate (68,70,72,74) above its center of gravity.

15. With respect to claim 23, Fierek shows wherein in addition to the handle, a slit (28 col 5 line 43) is formed in the support plate (68,70,72,74) through which a handle (26) of a second egg tray (16) can be passed.

16. With respect to claim 24, Fierek shows wherein the handle (26) has the form of a plate (any of the handles surfaces have the form of a plate fig. 8) and that one surface of the plate (the left side of the handle) is directly adjacent to the slit (28).

17. With respect to claim 25, Fierek shows wherein the plate (left side of the handle) is thicker in its upper area (thickness increases when traveling up the left side meets the top plate of the handle 26).

18. With respect to claim 26, Fierek shows a first egg tray (14) and a second egg tray, each egg tray having a support plate (68,70,72,74) in which a plurality of receptacles (18,20,22,24) for respectively one egg is formed, and a wall (102) surrounding the support plate, and that the surrounding wall is divided into a plurality of wall sections separated by recesses (60,62,64); a handle (26) projecting upwardly from the support plate (68,70,72,74) of each egg tray above its center of gravity and a slit (28 col 5 line 43) is formed in the support plate (68,70,72,74) of each egg tray, the handle (26) of one of the egg trays being receivable through the slit (28 col 5 line 43) of the

other egg tray to interconnect the egg trays; and the first and second egg trays being stackable (fig. 10 last paragraph of col 4) with one another by engagement of the wall (102) sections of one of the egg trays into the recesses (60,62,64) of the other egg tray.

19. With respect to claim 27, Fierek shows wherein the wall sections of the first egg tray (14) differ in height from the wall sections of the second egg tray (16) (fig.1).

20. With respect to claim 28, Fierek shows wherein the wall sections of the first and second egg trays have substantially the same dimensions with regard to height (to the extent “substantially the same” is defined, fig. 1 also meets this claim language).

21. With respect to claim 29, Fierek shows wherein each egg tray includes a spacer (the recess at the distal end of 68,70,72,74 shown but not labeled) disposed on an underside of the support plate, the spacer of one of the egg trays contacting a top side of the support plate (68,70,72,74) of the other egg tray to space the support plates of the respective egg trays apart from one another when the egg trays are stacked one above the other.

22. With respect to claim 30, Fierek shows wherein the receptacles of the first and second trays are aligned with one another when the egg trays are stacked (fig. 9).

23. With respect to claim 31, Fierek shows wherein the support plate (68,70,72,74) has an upper surface (top surface) and a lower surface (bottom surface), and wherein the wall sections (112 which are part of 102) project over a circumference of the support plate and downward from the support plate in a direction opposite from the upper surface.

24. With respect to claim 32, Fierek shows, to the extent the claim is understood, wherein each of the plurality of wall sections of the surrounding wall is located diametrically opposite to a recess of the surrounding wall.

25. With respect to claim 34, Fierek shows containers capable of performing when the egg tray and the second egg tray are twisted 180° with respect to each other and stacked together, the plurality of wall sections of the egg tray engage the recesses of the second egg tray, and the plurality of second wall sections of the second egg tray engage the recesses of the egg tray. (the broad term "engage" is met by the interaction of two of Fierek trays that interlock. when stacked).

26. With respect to claim 35, Fierek shows, to the extent the claim is understood, all of the understood structure has been cited in the combined rejection.

27.

However Fierek does not disclose wherein the receptacles are formed by openings in the support plate.

Cox teaches wherein the receptacles (30) are formed by openings in the support plate (28) in the same field of endeavor for the purpose of holding eggs.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to add openings in the bottoms of (18,20,22,24) of the first and second tray in order to keep the eggs from rolling around in the container.

28. Claims 33 rejected under 35 U.S.C. 103(a) as being unpatentable over Fierek in view of Cox as applied to claim 13 above, and further in view of Peebles (USPN 3,392,874).

Fierek in view of Cox discloses the invention substantially as claimed. However Fierek in view of Cox does not disclose the handle is a plate, and wherein only one surface of the handle is directly adjacent to the slit.

Peebles teaches the handle is a plate (16e), and wherein only one surface of the handle is directly adjacent to the slit (15) in the same field of endeavor for the purpose of stacking.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to add the handle design of the top container of Peeble to the container of Fierek in view of Cox in order to have a cheaper to make flat handle that allows stacking.

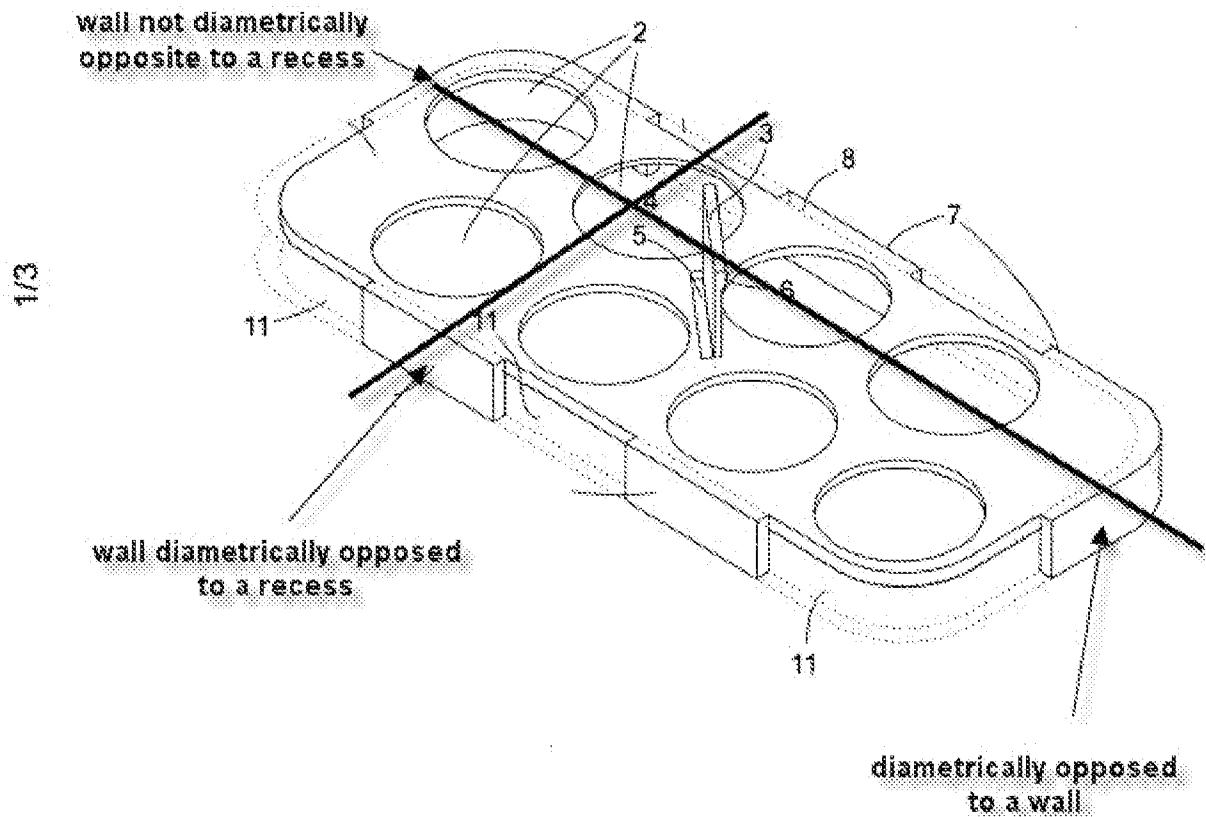
(10) Response to Argument

29. In response to appellant's argument against the 112 2nd paragraph on claims 11/18/2009.

30. The claim language in question is " the plurality of wall sections of the surrounding wall is located diametrically opposite to a recess of the surrounding wall"

31. See appellant's fig. 1 Below

Fig. 1

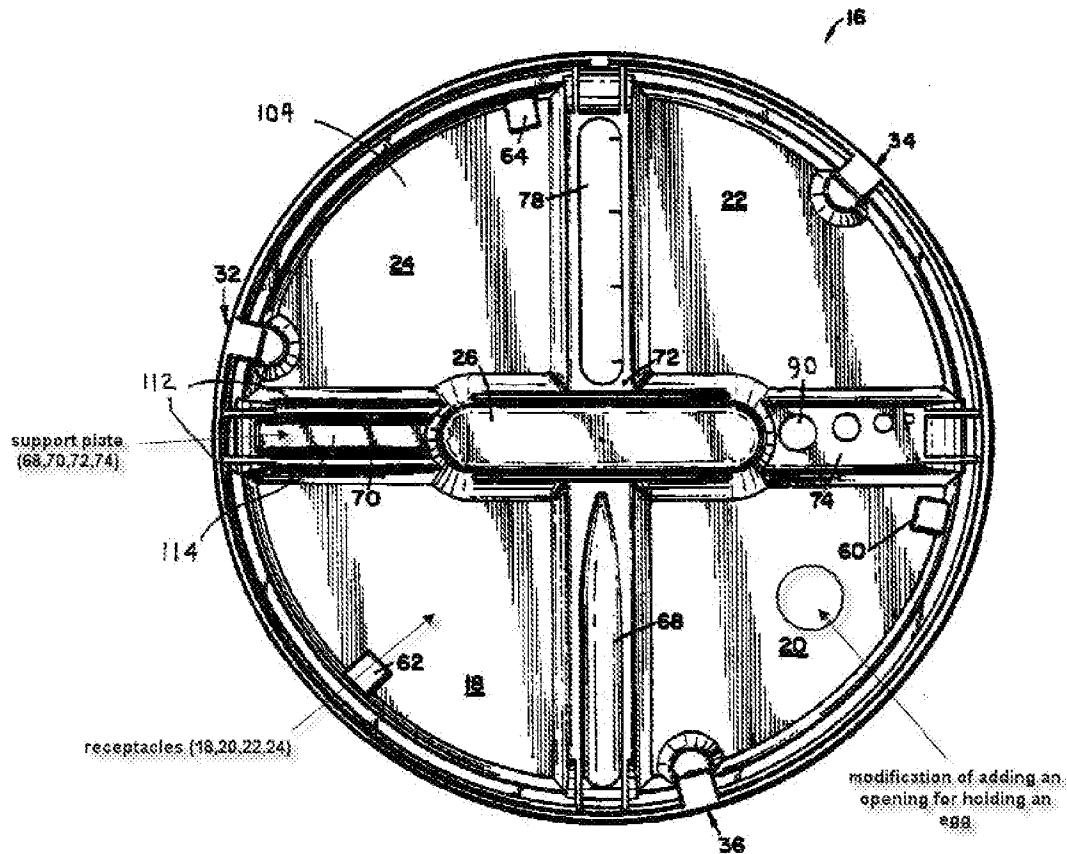


32. As for the amendment that was received after final, the claims in question were new in the 11/18/2009 amendment, it would take further consideration to determine if the after final amendment of 03/23/2010 was clearly disclosed and supported in the

original specification. As stated in the advisory action 04/06/2010, they have not been entered. New claims and amendments to the claims already in the application should be scrutinized not only for new matter but also for new terminology. While an applicant is not limited to the nomenclature used in the application as filed, he or she should make appropriate amendment of the specification whenever this nomenclature is departed from by amendment of the claims so as to have clear support or antecedent basis in the specification for the new terms appearing in the claims.

33. For clarification and response to appellant's 103 arguments please see the interpretation of Fierek below.

FIG.2



In response to appellant's argument titled under Independent claim 13, that there is no teaching, suggestion, or motivation to combine the references, the examiner recognizes that obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*,

837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), and *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007). In this case, the Cox reference teaches round openings (30) in a surface to secure eggs, which is actually well known, and the Fierek reference teaches what can be called a multi-tier basket. It is common practice to put eggs in a basket. It does not seem beyond the knowledge generally available to one of ordinary skill to add opening that hold eggs better to make it safer to put all your eggs in one basket. Appellant also argues that the eggs would be vulnerable to damage, and that the recess has nothing to do with access to cold air, but these differences do not represent a claimed structural difference. In response to appellant's argument that the references fail to show certain features of appellant's invention, it is noted that the features upon which appellant relies (i.e., access to cold air, eggs vulnerability,) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Also of note, Diametrically opposite is not claimed at all in claim 13.

In response to appellant's argument, starting on page 17, titled The advisory action, that there is no teaching, suggestion, or motivation to combine the references, the examiner recognizes that obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.

See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), and *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007). In this case, the Fierek basket is being modified in order to hold eggs. The reason for adding the opening is to positively hold eggs in a basket to keep them from rolling around in the basket and breaking against the sidewalls while rolling.

In response to the argument that Fierek would no longer function to hold nails, screws and tool, in essences teaching away. The modifications do not exclude the Fierek reference from holding any of the mentioned components. Just because there are a few more apertures doesn't exclude a user from putting any tool, nails, screws ect. in the container from storage. In some ways it will hold small round or oval tools better.

5. In response to appellant's argument that the references fail to show certain features of appellant's invention, it is noted that the features upon which applicant relies (i.e., the exclusion "the lower end of each of the eggs clearly would be exposed be below the alleged support plate) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

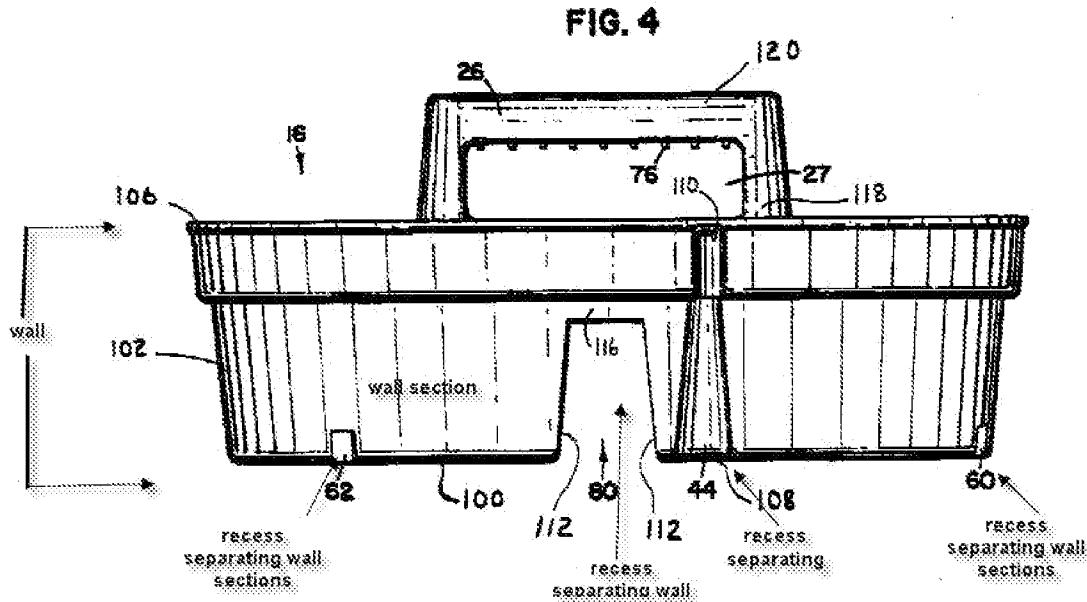
34. In response to appellant's arguments, the recitation an egg tray for a refrigerator has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the

claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

35. In response to appellant's argument that Fierek is not an "egg tray", a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

In further response to the "cold air" argument, the feature is not in the claims, also, cold air can travel through the hole below the handle or Fierek.

36. In response to the wall section separated by recesses, please see the marked up drawing below.

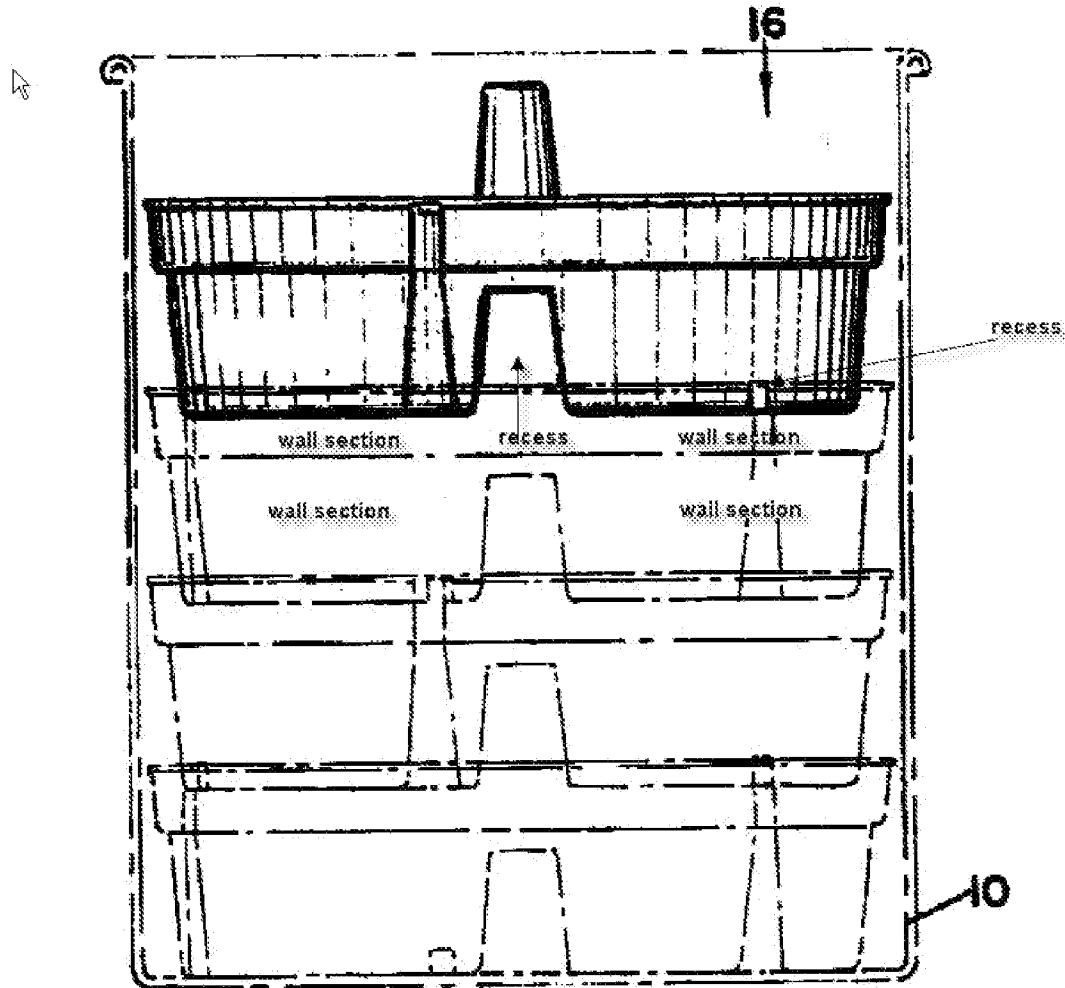


The claimed term "wall section" does not prohibit the wall section being connected together, it does not even define separate walls, one flat wall can have many sections. An upper and lower section for example. In this case the sections are separated by any of the recesses above.

37. In response to the arguments titled under Independent claim 26, as stated in previous action Fierek fig. 9 clearly shows the walls interaction with the recesses, also as discussed before the non-limiting interpretation of "engage" is shown in the marked up drawing below. Fig. 10 shows the non-limiting claim language of **engaging the wall section into the recesses**, in this case the recesses are (60,62,64) shown but not

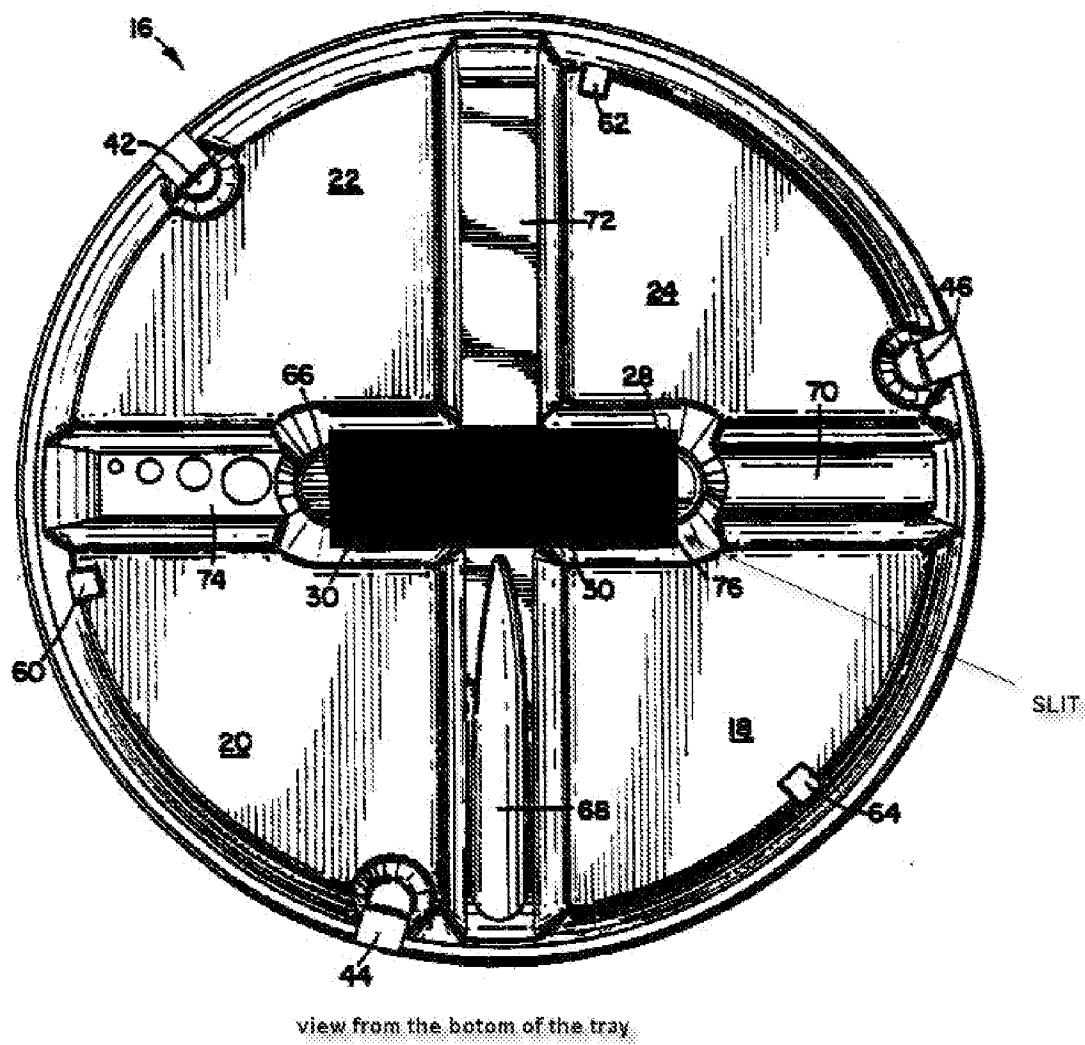
labeled.

FIG. 10



38. Below is a marked up drawing showing "a slit"

FIG.3

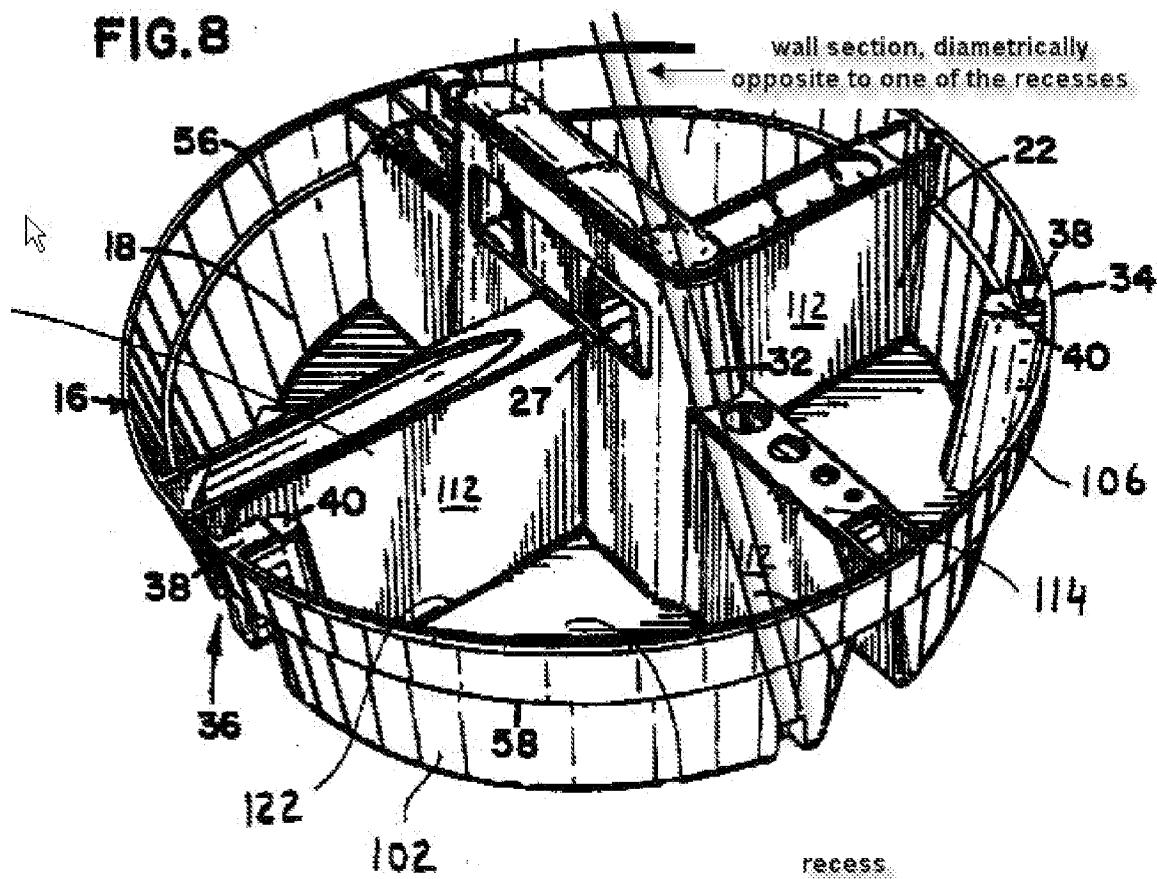


39.

The argument with respect to the "wall section" has been answered above.

Again, "diametrically opposed" language, is not in claim 26 and will be answered later in this response.

40. In response to the argument titled under Independent Claim 35, The 112 2nd paragraph rejection still applies to this claim. Appellant's fig.1 and disclosure do not meet the claim recitation, but Fierek being round does. The recesses (60,62,64) as applied to claim 35, are diametrically opposed to a wall section as shown below in a marked up drawing showing the Fierek reference.



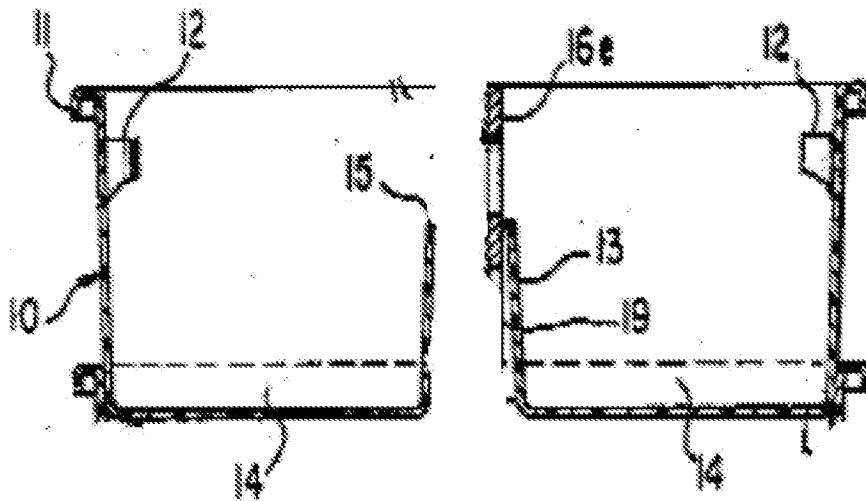
Also, although not claimed, the Fierek tray is capable of being twisted 180 degrees.

In response to the arguments against claim 33, on page 29, appellant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of

references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

41. Below is a marked up version of Peebles fig. 2, all of the handles, except (16e) have been removed, this shows in the same manner as appellant claims and discloses that the handle (16e) is not in the middle but on one side of the slit (15).

FIG.2



42.

Fig. 3 shows the handle in the middle, but (16e) was the handle relied upon, shown in fig. 2. And (16e) is placed to one side.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Shawn M Braden/

Examiner, Art Unit 3781

Conferees:

/Anthony Stashick/
Supervisory Patent Examiner, Art Unit 3781

/Nathan J. Newhouse/
Supervisory Patent Examiner, Art Unit 3782